

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF TEXAS  
3 HOUSTON DIVISION

4 HARVEST FAMILY CHURCH, \* 4:17-CV-02662  
5 ET AL \*  
6 VS. \* 10:02 a.m. to 10:46 a.m.  
7 FEDERAL EMERGENCY \*  
MANAGEMENT AGENCY, ET AL \* SEPTEMBER 8, 2017

8 TELEPHONIC STATUS CONFERENCE  
9 BEFORE THE HONORABLE KEITH P. ELLISON  
Day 1 of 1 Day

10 TELEPHONIC APPEARANCES:

11 FOR THE PLAINTIFFS:

12 Mr. Daniel Howard Blomberg  
13 Mr. Eric Christopher Rassbach  
14 Ms. Diana Marie Verm  
The Becket Fund for Religious Liberty  
15 1200 New Hampshire Avenue, N.W.  
Suite 700  
16 Washington, D.C. 20036  
(202) 955-0095

17 FOR THE DEFENDANTS FEDERAL EMERGENCY MANAGEMENT AGENCY AND  
18 WILLIAM B. LONG:

19 Ms. Kari D'Ottavio  
Ms. Lesley Farby  
U.S. Department of Justice  
20 20 Massachusetts Avenue NW  
Washington, DC 20530  
21 (202) 305-0568

and

22 Ms. Michelle Buckalew  
Ms. Angelica Saavedra  
23 Mr. Brock Pierson  
Federal Emergency Management Agency  
24 Office of General Counsel  
500 C Street SW  
Suite 840  
Washington, DC 20472

1 **IN COURT APPEARANCES:**

2 **FOR THE DEFENDANTS FEDERAL EMERGENCY MANAGEMENT AGENCY AND**  
3 **WILLIAM B. LONG:**

4 Mr. Daniel David Hu  
5 Office of the U.S. Attorneys Office  
6 1000 Louisiana  
7 Suite 2300  
8 Houston, Texas 77002  
(713) 567-9518

9 Court Reporter:  
10 Laura Wells, RPR, RMR, CRR  
11 515 Rusk, Suite 8004  
12 Houston, Texas 77002

13 Proceedings recorded by mechanical stenography.  
14 Transcript produced by computer-assisted transcription.  
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1 **PROCEEDINGS**

2 THE COURT: Good morning and welcome. We are on  
3 the record. This is Keith Ellison. We'll take  
4 appearances of counsel, beginning with plaintiffs, please.

10:04:59 5 MR. RASSBACH: Eric Rassbach for the plaintiffs.

6 THE COURT: One more time, please.

7 MR. RASSBACH: Eric Rassbach.

8 THE COURT: Thank you very much.

9 MS. D'OTTAVIO: Good morning, Your Honor. This  
10 is Kari D'Ottavio for defendants.

11 THE COURT: Thank you.

12 MR. HU: Daniel Hu, local counsel for defendants.

13 THE COURT: And for the defendants, are you with  
14 main justice?

10:05:21 15 MS. D'OTTAVIO: Yes.

16 THE COURT: Welcome to all. We wanted to have an  
17 early hearing because the timeframe seems quite telescoped  
18 on relief efforts; and I wanted to see if we could put in  
19 place at least a rough schedule of briefing and, if  
20 necessary, an evidentiary hearing.

10:05:41

21 Have you had a chance to discuss among yourselves any  
22 of these matters?

23 MS. D'OTTAVIO: Yes, Your Honor. We actually  
24 conferred earlier this morning about a proposed briefing  
25 schedule.

10:05:55

1 THE COURT: I'm sorry. Who is speaking, please?  
2 Who is speaking?

3 MS. D'OTTAVIO: Sorry, Your Honor. This is Kari  
4 D'Ottavio for defendants.

10:06:03 5 THE COURT: Okay.

6 MS. D'OTTAVIO: Counsel conferred this morning  
7 about a briefing schedule, and defendants proposed the --  
8 following the local rule for response brief, which would  
9 give us 21 days to respond and per your rule of ten days  
10 for a reply.

11 And plaintiffs' counsel -- correct me if I am wrong --  
12 proposed a more condensed schedule, September 18th, I  
13 believe, for defendants to respond and that following  
14 Friday, which I believe is September 22nd, for a reply.

10:06:43 15 And the -- one new piece of news that has come to  
16 light since, Your Honor, is FEMA has granted an extension  
17 for applying for funds from the public assistance program.  
18 So it was originally September 26th, 2017; and it is now  
19 November 22nd, 2017. So that we are hoping to take that  
10:07:08 20 into consideration with the briefing schedule.

21 THE COURT: Well, I'm glad to know that. I had  
22 not heard that. The more immediate problem, though, is  
23 just getting some repairs made to the properties, no?

24 MR. RASSBACH: Yes, Your Honor. This is Eric  
10:07:27 25 Rassbach for plaintiffs. That's part of the issue here,

1 as we tried to set forth in the motion. The -- our client  
2 -- some of our clients are having to figure out right now  
3 whether, for example, they have to demolish part of their  
4 facility; and the way, you know, FEMA works is that if you  
5 don't get the inspection by somebody from FEMA ahead of  
6 time, then they can say, well, we're not going to  
7 reimburse you for the demolition.

8 So there are sort of a lot of decisions like that that  
9 have to get made in the fairly near future about these  
10 things. And so it's great that they have moved out the  
11 deadline for filing the form; but really, the real issue  
12 is just being able to get into the process, despite the  
13 fact that we -- you know, that the initial form says on  
14 Line 3, "What is the purpose of the facility?" That's our  
15 -- that's our issue.

16 So if we could -- we certainly welcome the fact that  
17 they have moved out the formal filing deadline; but sort  
18 of the practical, on-the-ground effect is still there.

19 The other thing I would just mention, Your Honor, is  
20 that at least from, you know, prior discussion in public  
21 about this, there is also some possibility that FEMA is  
22 going to run out of money. There is, obviously, Harvey.  
23 I think it's the largest national disaster in U.S. history  
24 in terms of dollar amounts; and then we're about to get  
25 Irma in Florida. And so if we have to sort of go to the

1 back of the queue, if you will, to get funds, you know, by  
2 the time we get to the front, there may not be anything  
3 left. So that's another part of it.

10:09:27

4 I would say the main issue, though, is just having to  
5 make decisions right now about things like demolition  
6 without being able to access the process.

7 THE COURT: Let me ask this: Do the parties  
8 agree that this is purely a legal question, or do we  
9 actually need to take evidence?

10:09:45

10 MS. D'OTTAVIO: Your Honor, this is Kari  
11 D'Ottavio for defendants. And we would think that this is  
12 a purely legal question at this point. It's whether or  
13 not the plaintiff churches are eligible for FEMA relief  
14 under the public assistance program. It kind of goes to  
15 the heart of what plaintiffs are asking and why they think  
16 that even applying for FEMA aid, which they have not yet  
17 done, is futile if they think that they are categorically  
18 excluded from such funds and want a decision on that  
19 issue.

10:10:04

20 And we would -- we would propose -- well, we would  
21 argue that there is no categorical exclusion. So, yes, it  
22 would be a purely legal question at this point.

23 THE COURT: Well, are you alleging that they  
24 don't have standing because they haven't yet replied or --

10:10:38

25 MS. D'OTTAVIO: That's certainly -- certainly an

1 issue.

2 THE COURT: Well, if it's an issue, then that's a  
3 totally different issue than the one I thought we would be  
4 deciding.

10:10:53

5 MR. RASSBACH: If the plaintiffs -- I'm sorry.  
6 This is Eric Rassbach for plaintiffs.

10:11:10

7 If the defendants will, you know, agree to process our  
8 claim the same way that they would process, say, The Alley  
9 Theater, which is also, you know, damaged and a nonprofit,  
10 you know, then I don't think the Court actually has to  
11 decide anything. If they just agree that they will not  
12 exclude us from the process, we'll, you know, file our  
13 forms tomorrow and get in there.

10:11:30

14 But I think that the issue is that they -- you know,  
15 they have this in their policies. I mean, it's not --  
16 it's not something where this is --

17 THE COURT: I quite agree with that, but I would  
18 hate to see us get hung up on an argument about no case or  
19 controversy.

10:11:47

20 MR. RASSBACH: Well, I agree with that, Your  
21 Honor. We'll file the forms now if that, you know, avoids  
22 that issue. We just -- under their current policy, it's  
23 futile.

10:12:02

24 THE COURT: I understand, but I am -- I  
25 understand perfectly what you are saying. On the other

1 hand, I would feel somewhat remiss about ordering FEMA to  
2 grant money awarded to organizations that haven't even  
3 applied for it. That seems like a dangerous precedent,  
4 too.

10:12:20

5 MS. D'OTTAVIO: And, Your Honor --

10:12:36

6 MR. RASSBACH: And I agree with that, Your Honor.  
7 We're not actually asking you to even order a monetary  
8 amount, just to be very clear. We're actually just asking  
9 to be let in the door of the process, so to speak. And  
10 so, you know, we're not actually asking for an order of  
11 funding at the end of the day. We're really asking for  
12 the ability to get processed like any other nonprofit.

10:12:55

13 THE COURT: But the same point. The same point.  
14 It's going to be -- we're going to lack case or  
15 controversy status unless you have made the initial  
16 application, I fear.

10:13:16

17 MR. RASSBACH: Okay. Well, we will take -- if  
18 that's -- if that will ease the process, we'll just go  
19 ahead and do it. And then if we get turned down, we'll --  
20 it will be even clearer.

21 THE COURT: I think we're probably going to have  
22 a long appellate tail on this case, and I would like to at  
23 least steer clear of defects that might prevent an  
24 appellate court from reaching a full-body decision.

10:13:33

25 MR. RASSBACH: I think that is -- I think you are



1 probably right about that, Your Honor.

2 MS. D'OTTAVIO: Your Honor, this is Kari  
3 D'Ottavio for the defendants. And plaintiffs --  
4 plaintiffs seem to want FEMA to accept their application  
10:13:49 5 and process them like they would any other private  
6 nonprofit, and FEMA absolutely would. Every application  
7 is assessed on a case-by-case basis. There is no blanket  
8 exclusion. They are absolutely not prevented from  
9 applying in any way, shape or form.

10:14:06 10 This really goes to the -- the heart of the debate in  
11 this case is how this -- how this policy works in action;  
12 and if plaintiffs were to apply, then they would  
13 absolutely be considered, just like any other private  
14 nonprofit, and the same analysis would go into play. But  
10:14:22 15 again, they have not yet applied. And if they do then,  
16 you know, FEMA will absolutely assure that they will be  
17 processed just like any other private nonprofit. That's  
18 how -- that's how the policy works.

19 THE COURT: Well, but they are not considered  
10:14:37 20 like other private non-profits, are they? I mean, they  
21 are not -- the fact that it's a religious organization  
22 takes it out of the category of other nonprofits, does it  
23 not?

24 MS. D'OTTAVIO: Well, not necessarily. Just  
10:14:56 25 because they are a religious institution does not

1 categorically exclude them from that process if they --  
2 it's a case-by-case determination whether the services  
3 that an organization provides, whether they are a  
4 religious organization or not, is essentially government  
5 services or primarily government services. So that would  
6 be the analysis that goes into the application process,  
7 regardless if it's a religious institution or not. Every  
8 private nonprofit would have to be assessed in the same  
9 way.

10 THE COURT: Okay. Now it begins to sound like we  
11 will have an evidentiary hearing because I'm not sure what  
12 criteria I'm going to be asked to apply in determining  
13 whether these particular religious organizations are  
14 eligible for FEMA funds.

15 MS. D'OTTAVIO: Right. And if this is --

16 MR. RASSBACH: Your Honor, if this is --

17 MS. D'OTTAVIO: -- declined and they challenge  
18 the denial, then it would be based on, you know, the  
19 specifics of that case. What the plaintiffs are arguing  
20 now is it's futile for them to even apply because they are  
21 categorically excluded, which we would argue is certainly  
22 not the case.

23 MR. RASSBACH: Your Honor, I think -- I think we  
24 are sort of -- there is a little bit of leveraging going  
25 on here about what is a religious organization.

1           So a religious organization, let's say like Seven  
2 Acres Jewish Retirement Home over on Braes Bayou, which  
3 also got flooded, they are -- they can apply because they  
4 are not, you know, a house of worship and they don't use  
5 more than 50 percent of their -- you know, they are not  
6 more than 50 percent religious use as -- you know, that is  
7 the rule under the FEMA policy guide.

8           But if you go right across the bayou to Beth Israel,  
9 the reform temple across the bayou from Seven Acres,  
10 essentially, they are not going to be eligible, even  
11 though they got three feet of water in their sanctuary.

12           So it's not -- you know, I think that the issue is  
13 they are going to want to say, oh, it's just  
14 discretionary; but then somehow the -- they have a rule  
15 saying if it's more than 50 percent religious usage, then  
16 you are out. And we have said in our pleadings and in our  
17 motion that it's -- that it's more than 50 percent.

18           So, you know, I hear -- I hear what she is saying but  
19 that's not -- that's not really -- you know, sure, it's  
20 not a categorical exclusion based on the fact it's a  
21 religious nonprofit. It's based on the 50 percent rule.  
22 And we are saying we are more than 50 percent a house of  
23 worship. You know, we are not going to lie on the form  
24 saying it's not a house of worship.

25           MS. D'OTTAVIO: And, Your Honor, I would just

10:18:09

1 like to respond saying it's not a discretionary, you know,  
2 analysis. FEMA has to apply the terms of the statute,  
3 which explicitly requires that private non-profits provide  
4 essential services of a governmental nature to the general  
5 public, and this is where this 50/50 rule comes -- comes  
6 into play.

10:18:25

7 So if they are not providing primarily services of a  
8 governmental nature -- and primarily religious services  
9 would not necessarily count as a governmental nature by  
10 virtue of the fact that they are religious services --  
11 then they would not count as an eligible private  
12 nonprofit. But again, it's a case-by-case determination  
13 based on the factors and the regulations that are in  
14 place.

10:18:44

15 THE COURT: But it sounds like the issue that  
16 FEMA needs to decide is being conceded by the plaintiffs.

10:19:09

17 MS. D'OTTAVIO: Well, I mean, FEMA would, you  
18 know, make that determination themselves; but if that is  
19 the case, then that is simply adhering to what the statute  
20 mandates.

10:19:36

21 THE COURT: I see. Okay. Well, it sounds to me  
22 still like we have a fairly narrow legal question which  
23 is, I would presume, whether *Trinity Lutheran v. Comer*,  
24 C-o-m-e-r, controls this case or not. Isn't that our  
25 issue?

1 MS. D'OTTAVIO: That is -- that is certainly an  
2 issue that, you know, plaintiff talked about and we can  
3 certainly respond to. We believe that *Trinity Lutheran* is  
4 certainly distinguishable from -- from the facts of this  
5 case.

10:19:50

6 THE COURT: Well, what is the distinction?

7 MS. D'OTTAVIO: So *Trinity Lutheran*, that church  
8 was excluded from the program, the state program simply  
9 because it was a church. It was otherwise eligible for  
10 the grant at issue.

10:20:07

11 And here, churches would be excluded not because of  
12 their status or identity as a church but because of the  
13 function that they serve.

14 So there is, you know, many churches that provide, for  
15 example, a soup kitchen or a homeless shelter; and that  
16 would presumably count as an essential government service.  
17 And the issue would be whether they primarily serve  
18 something along those lines or something, you know,  
19 strictly, you know, religious services.

10:20:18

20 And if they provide primarily religious services, that  
21 would fall outside the intent of definitions provided in  
22 the Stafford Act, which is to provide assistance to state  
23 and local governments. So it's not necessarily a  
24 categorical exclusion, like in *Trinity Lutheran*, simply  
25 because it was a church. It's a case-by-case analysis of

10:20:36

10:20:53

1 whether -- of the services that a particular religious  
2 institution provides.

10:21:10

3 And I would just like to add that in the past, in the  
4 past ten years even, FEMA has provided funds to hundreds  
5 of religious institutions that have met the criteria laid  
6 out in the regulation. So it is certainly not the case  
7 that one's status as a church precludes them from the  
8 grant at issue.

10:21:31

9 So we would -- we would proffer that *Trinity Lutheran*  
10 is not -- does not bear on this case, and it's certainly  
11 distinguishable.

10:21:47

12 THE COURT: Okay. Well, it sounds like -- it  
13 sounds like, if I am understanding the government's  
14 position, that we have -- we first have to await a factual  
15 resolution of plaintiffs' applications; and it could be  
16 even that two of the churches are going to qualify for  
17 FEMA funds and one will not. Possible?

10:22:11

18 MS. D'OTTAVIO: So I -- I would say that it is  
19 certainly possible that, you know, one may -- one may be  
20 eligible and one may be not, specifically in the case of  
21 one of the churches who has been providing sheltering  
22 services.

10:22:29

23 So even if that -- it's my understanding that even if  
24 that church were otherwise, you know, an ineligible PNP  
25 because they provide primarily religious services, they

1 still could be reimbursed for the services they provided  
2 in the aftermath of Hurricane Harvey, depending on if they  
3 have some sort of agreement set up with the state to  
4 provide those services.

10:22:43 5 So that could be a case where they would be eligible  
6 for reimbursement funds and the other churches could not  
7 be. So again, this just underscores the fact that it is a  
8 case-by-case analysis that FEMA would undertake for these  
9 three churches, along with any other private nonprofit  
10:23:01 10 that applies.

11 MR. RASSBACH: Just so -- this is Eric Rassbach  
12 for the plaintiffs again -- Your Honor is aware, the PNP  
13 facility questionnaire that FEMA puts out, the third line  
14 says, "What was the primary purpose of the damaged  
10:23:09 15 facility?"

16 And for all three of our clients, you know, the answer  
17 -- the true answer to put on that line is church or house  
18 of worship. So, you know, we can put that on there. And  
19 then, if you look at the FEMA policy guide, their  
10:23:32 20 published, you know, written policy guide that they have  
21 out there --

22 THE COURT: Maybe there is just a semantic nuance  
23 here. I can imagine that a church would list itself as a  
24 house of worship but also provide shelter and meal service  
10:23:49 25 for the disadvantaged. And if I understand the

1 government's position, that might nonetheless entitle the  
2 church to government funds because, if denominated a  
3 church or denominated something else, it is providing care  
4 that the government would otherwise need to provide.

10:24:16 5 MS. D'OTTAVIO: That's exactly right, Your Honor.  
6 That is our position that it's not necessarily because  
7 they are a house of worship that they wouldn't be  
8 eligible. It depends on the services that they provide.  
9 If they provide stuff like sheltering services or, you  
10:24:32 10 know, for example, a soup kitchen, you know, run out of  
11 the church or a homeless shelter, I mean, these are the  
12 types of -- you know, that would fall in the category of  
13 essential government-type services that the statute is  
14 intended to -- to reimburse for.

10:24:49 15 MR. RASSBACH: Your Honor, I mean, I hear what  
16 opposing counsel is saying; but it's not what FEMA's  
17 written policies say or how they've treated appeals.

18 So, for example, their policy says that facilities  
19 established or primarily used for religious activities are  
10:25:06 20 simply not eligible if it is used more than 50 percent of  
21 the time for religious activities --

22 THE COURT: You are going too fast. You are  
23 going too fast. Start the quote over again.

24 MR. RASSBACH: Sure. It says, quote, Facilities  
10:25:18 25 established or primarily used, end quote, for religious



1 activities are simply, quote, not eligible, end quote.  
2 That's on 12 of the -- on Page 12 of the FEMA policy  
3 guide. And if it is used -- established or used for more  
4 than 50 percent of the time for, quote, religious  
10:25:36 5 activities such as worship, proselytizing, religious  
6 instruction, it is not eligible.

7 Then if you look at how they have applied that in  
8 practice in appeals, these are not, you know, not just the  
9 policy. It's also decisions that were -- that they've  
10:25:56 10 made. You know, they don't actually provide it.

11 So if you look at the *Mount Nebo Bible Baptist Church*  
12 appeal that they've decided, they denied the grant because  
13 even though they did provide literacy programs, clothing  
14 distribution, food and nutrition programs, they couldn't  
10:26:19 15 prove that more than -- you know, that enough of their  
16 activities were, quote-unquote, nonreligious.

17 Now, of course, from the viewpoint of the religious  
18 institutions, handing out -- you know, handing out  
19 literacy, clothing distribution, food, nutrition, soup  
10:26:32 20 kitchen, it is religious. That is a religious activity  
21 from their point of view, and maybe that's just semantics.  
22 But the point is that they -- FEMA says we're going to  
23 decide how much of your institution is religious, and then  
24 we're going to do that.

10:26:48 25 That is also a problem just, you know, from a

1 constitutional standpoint as well. If you look at the  
2 *Hosanna-Tabor* case that got decided a few years ago in  
3 2012, the Supreme Court said, you know, you can't decide  
4 whether a particular position is a ministerial position or  
5 not based on using a stopwatch.

10:27:09

6 THE COURT: Yeah. I understand what you are  
7 saying, and I agree that the policy as written seems quite  
8 clear. It would not be the first time that the common law  
9 of government grantsmanship differs from the written  
10 policy of government grantsmanship. I mean, that happens.

10:27:25

11 We're going to take a 15-minute break. Thank you very  
12 much.

13 MS. D'OTTAVIO: Thank you, Your Honor.

14 MR. RASSBACH: Thank you, Your Honor.

10:27:55

15 (Recess from 10:27 a.m. to 10:40 a.m.)

16 THE COURT: Okay. Do we have everybody back?  
17 The defendants, Mr. Hu is here in the courtroom.

18 MS. D'OTTAVIO: Yes, Your Honor. This is Kari  
19 D'Ottavio for the defendants.

10:40:56

20 MR. RASSBACH: Yes.

21 THE COURT: Any further thoughts?

22 MR. RASSBACH: I would add, Your Honor, that --  
23 this is Eric Rassbach for the plaintiffs again -- if you  
24 look at, for example, this *Unitarian* case that they  
25 decided at the end of 2015, the *Community Church Unitarian*

10:41:11

1 Universalist appeal decided December 31st, 2015, they  
2 found it ineligible. FEMA found it ineligible because it  
3 believed that the building was, quote, established for  
4 religious purposes, end quote.

10:41:26

5 Then if you look at the decision they -- you know,  
6 they go through the applicant's articles of incorporation  
7 which says it was, you know, organized for the purpose of  
8 practicing the principles of the Unitarian Universalist  
9 faith, looked at the bylaws.

10:41:44

10 So, you know, I hear what Ms. D'Ottavio is saying; but  
11 it just isn't how FEMA has done things. And if they are  
12 really going to change their position so that, you know,  
13 someone that provides a lot of public services suddenly is  
14 allowed, then they need to make that a lot clearer.

10:42:04

15 And I don't see why they should have a problem  
16 agreeing to the Court right now that they will treat us  
17 just like anyone else and that they won't treat us like  
18 this Unitarian Universalist Church that they denied just  
19 two years ago.

10:42:19

20 THE COURT: Well, the world has changed since two  
21 years ago though. I mean, I think *Trinity Lutheran* was an  
22 epochal decision.

10:42:35

23 MR. RASSBACH: Well, I certainly agree it's a  
24 very important decision. I'm just saying that if FEMA was  
25 looking at -- you know, if the policy that they are saying

1 that they want to keep applying in their policy guide  
2 tells them to look at articles of incorporation and bylaws  
3 rather than, you know, what are we doing in the world and  
4 providing services in lieu of the government, then, you  
10:42:55 5 know, it's not -- it's not crazy for my client to say,  
6 gosh, you know, I guess I'm out of this.

7 I'm also -- my articles of incorporation say that I'm  
8 incorporated for religious purposes, too. So, you know,  
9 maybe the world has changed; but FEMA needs to announce  
10:43:11 10 that it's changing, too.

11 THE COURT: Well, I'm still -- I'm still stuck on  
12 the issue of standing. And it seems to me that, at the  
13 very least, we need to get plaintiffs to file whatever  
14 application is specified for the kind of relief that's  
10:43:31 15 desired; and I don't -- I don't really think we have a  
16 cognizable case unless the plaintiffs do that.

17 MR. RASSBACH: Okay, Your Honor. Well, I think  
18 we can react to that quickly.

19 THE COURT: And so I think I'll stay the case  
10:43:54 20 right now; and if an application is filed for FEMA funds,  
21 then I think we can use our usual court schedule for a  
22 response to preliminary injunction application and then  
23 the reply.

24 But it wouldn't hurt for you guys to talk and see if  
10:44:26 25 before you go through the whole application process there

1 is some way of tailoring the application so that it would  
2 meet FEMA's standards. We can save ourselves a lot of  
3 litigation expense.

10:44:46

4 MR. RASSBACH: Well, we can cut out the factual  
5 part of it, too.

10:44:58

6 THE COURT: I mean, I have to -- going back to  
7 the question of whether we have a legal question or a  
8 factual question, it seems to me we, in sequence, have  
9 both. We first have a factual question as to whether the  
10 churches qualify under what FEMA maintains its rubric is.  
11 And then we have the question of, if the churches do not  
12 qualify, whether that's a violation of the free exercise  
13 clause. I mean, am I wrong about that?

10:45:28

14 MS. D'OTTAVIO: This is Kari D'Ottavio for  
15 defendants. I think that makes sense, Your Honor. I  
16 would just like to clarify the schedule you laid out.  
17 Once plaintiffs apply for the funds --

10:45:42

18 THE COURT: I think they have to amend their  
19 complaint and amend their request for preliminary  
20 injunction because, otherwise, we really can't proceed.

21 MS. D'OTTAVIO: Okay. Thank you, Your Honor.

22 THE COURT: Is there anything else we can  
23 accomplish today?

24 (No response.)

10:45:58

25 THE COURT: Okay. Well, I look forward to

1 working with all of you. Thank you very much. Thank you.

2 MR. RASSBACH: Thank you, Your Honor.

3 MS. D'OTTAVIO: Thank you, Your Honor.

4 (Proceedings concluded at 10:46 a.m.)

5 *Date: September 19, 2017*

6 ***COURT REPORTER'S CERTIFICATE***

7 *I, Laura Wells, certify that the foregoing is a*  
8 *correct transcript from the record of proceedings in the*  
9 *above-entitled matter.*

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11 */s/ Laura Wells*

12 *Laura Wells, CRR, RMR*

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